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In The Supreme Court Of The United States

OCTOBER TERM, 2002

GRAY DAVIS, et al., *Petitioners*,
v.
CHARLES W. THOMPSON and
STEPHEN L. BOGOVICH, et al., *Respondents*..

On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit was correct to find that state parole board decisions are subject to Title II of the ADA, which explicitly applies to *all* state agencies?

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STATEMENT OF THE CASE

Respondents ("plaintiffs") are California state prisoners serving indeterminate life terms who allege that the state Board of Prison Terms (BPT) has discriminated against them because of their disabilities. App. 4. Plaintiffs sued state parole officials, asserting that the way in which they consider a prisoner's substance abuse history when making parole decisions violates Title II of the Americans with Disabilities Act (ADA). *Id.* Specifically, plaintiffs allege that petitioners ("defendants") fail to make an individualized consideration of their disabilities and the way in which those disabilities may be accommodated in determining their suitability for release on parole. App. 5. Plaintiffs seek only prospective injunctive relief: an injunction banning the BPT from "[c]ontinuing to deny plaintiffs a parole release date primarily because of their substance abuse disabilities." *Bogovich v. Sandoval*, 189 F.3d 999, 1001 (9th Cir. 1999).

Defendants filed a motion to dismiss based on four grounds: "1) no proper defendant named; 2) res judicata bars plaintiff Thompson's claims; 3) rehabilitated substance abusers are not disabled within the meaning of the ADA; and 4) legitimate penological interests mandate consideration of past substance abuse." App. 19-20. The magistrate judge rejected all four grounds but *sua sponte* and without any briefing from the parties, recommended dismissal of plaintiffs' claims because, he reasoned, they are not cognizable under the ADA. App. 27-32. The district court adopted the magistrate judge's recommendations and dismissed plaintiffs' action without leave to amend. App. 37.

On appeal, the Ninth Circuit reversed the dismissal, holding that "parole proceedings constitute an activity of a public entity that falls within the ADA's reach" and that "a broad rule categorically excluding parole decisions from the scope of Title II is not the law." App. 14 (quotation and internal quotations omitted).

Defendants now petition for writ of certiorari.

ARGUMENT

I. THIS COURT SHOULD DENY CERTIORARI ON DEFENDANTS' ELEVENTH AMENDMENT ISSUE BECAUSE THEY FAILED TO RAISE IT IN THE NINTH CIRCUIT

A. Defendants Failed to Raise Their Eleventh Amendment Argument in the Ninth Circuit

Defendants argue in their Petition for Certiorari that Congress failed properly to abrogate states' Eleventh Amendment immunity in passing Title II of the ADA, and claim that there is a Circuit split on this issue. Defendants urge the Court to grant certiorari in the present case to resolve the question of whether Congress acted within its Fourteenth Amendment powers in passing the statute. However, because defendants failed to raise the issue below and it was neither considered nor decided by the Ninth Circuit, the Court should deny certiorari. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("[w]here issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them") (citations omitted).

The Ninth Circuit opinion from which defendants seek

review makes no reference to Eleventh Amendment immunity. App. 1-14. This is not surprising, since defendants failed properly to raise this argument in their briefing to the Ninth Circuit: their "Question Presented" to the lower court challenged only the scope of Title II, not its constitutional validity.[1] Their brief did the same.[2] In fact, defendants took the position in the Ninth Circuit that Title II of the ADA does apply to prison officials. Their only argument in the lower court was that the ADA should not be extended to reach the facts before the court - not that it is

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[1] Defendants' "Question Presented" to the Ninth Circuit is as follows: "Should this Court affirm the District Court's holding that the civil remedies permitted under the [ADA] do not apply to or infringe upon the substantive decisions of a state's criminal justice system?"

[2] The headings in the argument section of defendants' brief are the following: "I. THE DISTRICT COURT CORRECTLY HELD THAT THE CIVIL AMERICANS WITH DISABILITIES ACT FINDS NO APPLICATION TO SUBSTANTIVE STATE CRIMINAL JUSTICE SYSTEM DECISIONS"; "A. This Court Should Affirm the District Court Based Upon Deficiencies Specific to Inmate Thompson and Bogovich's Complaint"; "B. This Court Should Affirm the District Court Because the ADA Serves to Provide Civil Remedies Rather than Dictating Substantive Decisions Regarding State Criminal Justice Systems"; and "II. LEGITIMATE PENOLOGICAL INTERESTS IN PROTECTING THE LAW ABIDING PUBLIC FROM CONVICTED MURDERERS MANDATES CONSIDERATION OF PAST SUBSTANCE ABUSE."

an invalid exercise of Congress's Fourteenth Amendment powers.

The passing reference in a footnote to this Court's holding in *Board of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001), that defendants made in their brief is insufficient to raise the issue. In *Garrett*, the Court held that Title I of the ADA does not abrogate states' Eleventh Amendment immunity. *Id.* at 374. The Court explicitly limited its holding to Title I, taking no position as to the constitutional validity of Title II. *Garrett*, 531 U.S. at 360 n.1 ("[w]e are not disposed to decide the constitutional issue whether Title II, which has somewhat different remedial provisions from Title I, is appropriate legislation under § 5 of the Fourteenth Amendment"). In their footnote, defendants hinted that *Garrett*'s holding could apply to Title II. Their only argument on Title II's validity was that "no principled distinction exists between Title I and Title II as both relied upon the same insufficient findings of Congress." In fact, *Garrett* made it quite clear on the exact page cited by defendants that there is a significant difference in the Congressional findings between Title I on the one hand and Titles II and III on the other:

> . . . somewhere around 50 of [the allegations listed in Judge Breyer's dissenting opinion] describe conduct that could conceivably amount to constitutional violations by the States. . . . The overwhelming majority of these accounts pertain to alleged discrimination by the States in the provision of public services and public accommodations, which areas are addressed in

Titles II and III of the ADA.

Garrett, 531 U.S. at 372 n.7. Defendants failed to provide in their footnote any analysis as to why the Congressional findings do not support Title II. Such an analysis is crucial, given *Garrett*'s distinction between the evidence on Title I and Title II.

The unsupported statement in a footnote that *Garrett*'s detailed factual findings apply to Title II as well as Title I is insufficient to raise this issue before the Ninth Circuit. The Ninth Circuit's silence on the issue reflects that fact. Certiorari should therefore be denied.

B. This Court Should Deny Certiorari on Defendants' Eleventh Amendment Argument Because *Ex parte Young* Allows Plaintiffs to Sue State Officials for Injunctive Relief and Because the State Officials in this Case Have Been Determined to Be Proper Defendants

Under the *Ex parte Young* doctrine, plaintiffs may sue state officials in their official capacity for injunctive relief. *Ex parte Young*, 209 U.S. 123 (1908); *Garrett*, 531 U.S. at 374 n.9. In the present case, plaintiffs sued state officials in their official capacity for injunctive relief. App. 20. Thus, *Ex parte Young* applies, making Eleventh Amendment immunity inapplicable.

In their Petition for Certiorari, defendants argue that the *Ex Parte Young* doctrine is not available to plaintiffs because it applies only when the defendants are individuals. According to defendants, individuals cannot be sued under Title II of the ADA, which applies to "public entities." Thus, under defendants' theory, *Ex parte Young* will never apply

to ADA Title II cases. Also under this theory, the defendants themselves are improperly sued.

This argument fails because the district court in this case has already determined that the defendant state officials are proper defendants. App. 20-23. Since defendants did not appeal this finding, they have waived their right to argue this point here or in the lower court. *See, e.g., Nelson v. Adams USA, Inc*, 529 U.S. 460, 469 (2000) (noting "the general rule that issues must be raised in lower courts in order to be preserved as potential grounds of decision in higher courts").

Because defendants have failed properly to raise and argue in the Ninth Circuit the Eleventh Amendment issues they now present to this Court, and because the Ninth Circuit neither considered nor decided any Eleventh Amendment issues, defendants' petition for certiorari must be denied.

II. CERTIORARI SHOULD BE DENIED BECAUSE THERE IS NO CIRCUIT SPLIT OVER WHETHER THE ADA APPLIES TO ALL ACTIVITIES OF A PUBLIC ENTITY

According to defendants, the Ninth Circuit's holding constitutes a "unique" application of the ADA in a "substantive criminal-justice context." They argue that the decision below created a conflict among the Circuits. There is no conflict here. The decisions defendants rely on are based on a completely different factual context — discriminatory arrests — that has little application to parole proceedings.

A. The Ninth Circuit Decision Is Consistent with Decisions of this Court and of the Courts of Appeal

Defendants' argument is fatally flawed for three reasons. First, the Ninth Circuit held in this case that the ADA applies to parole boards like it applies to all other state entities and forbids them from discriminating based on disability. Thus, if a parole board refused to release prisoners who use wheelchairs because they use wheelchairs, or diabetics because they are diabetics, the ADA would provide a cause of action. No court has held to the contrary. Thus, there is no conflict with cases of this Court or with other Circuits.

Second, there is nothing "unique" about the Ninth Circuit's opinion in this case. It is an unremarkable application of this Court's holding in *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 209 (1998), that Title II applies to the operations of all public entities, including criminal justice agencies such as prisons. In *Yeskey*, this Court held unanimously that by its plain language the statute "unambiguously extends to state prison inmates." 524 U.S. at 209-210. In the present case, the Ninth Circuit similarly held that "the plain language of the ADA extends its anti-discrimination guarantees to the parole context. . . . Like state prisons, state parole boards 'fall squarely within the statutory definition of "public entity," which includes "any department, agency, special purpose district, or other instrumentality of a State or States or local government."'" App. 13 (quoting *Yeskey*, 118 S. Ct. at 1954-55, in turn quoting 42 U.S.C. § 12131(1)(B)).

Third, it is defendants' theory — that the decision to

release a prisoner on parole is so important it should be exempt from anti-discrimination law — that is unique and conflicts with decisions by this Court and by Courts of Appeal. This theory flies in the face of *Yeskey*, in which this Court held that the ADA applies to the determination as to whether a prisoner would be placed in a boot camp program that would reduce his sentence by at least a year. *Yeskey*, 524 U.S. at 208. There is no principled distinction to be made between the sentence-shortening decision challenged in *Yeskey* and the parole decisions challenged in the present case. Moreover, as the Ninth Circuit found, defendants' theory also directly contradicts decades of well-established case law requiring state parole officials to follow federal anti-discrimination requirements:

> [f]or example, circuit courts have long held that parole boards may not exclude an inmate from consideration for parole based on race. *See, e.g., White v. Bond*, 720 F.2d 1002, 1003 (8th Cir. 1983); *Candelaria v. Griffin*, 641 F.2d 868, 870 (10th Cir. 1981).

App. 11. The court thus concluded, "[t]he fact that considering a prisoner for parole is a substantive, criminal law decision does not license the decision-maker to discriminate on impermissible grounds." *Id.* at 12-13.

B. The Cases On Which Defendants Rely Do Not Support Their Argument of a Conflict among the Circuits

Defendants' theory of a Circuit split relies on four cases involving claims of discriminatory arrests: *Rosen v. Montgomery County Maryland*, 121 F.3d 154 (4th Cir.

1997); *Hainze v. Richards*, 207 F.3d 795 (5th Cir.), *cert. denied*, 531 U.S. 959 (2000); *Bryant v. Madigan*, 84 F.3d 246, (7th Cir. 1996); and *Gohier v. Enright*, 186 F.3d 1216 (10th Cir. 1999). Even assuming that arrests are sufficiently similar to parole decisions to create a circuit split, defendants' argument fails. Two of defendants' four arrest cases, *Rosen* and *Bryant*, were decided before *Yeskey* and have been implicitly overruled by that case. The other two cases involved Courts of Appeal grappling with how, and not whether, to apply the ADA to arrests.

The Fourth Circuit's holding in *Rosen v. Montgomery County Maryland* questions in *dicta* whether arrests are covered by the ADA.[3] *Rosen*, 121 F.3d at 157. The only two cases cited by the Fourth Circuit in this passage are no longer good law. *Gorman v. Bartch*, 925 F. Supp. 653 (W.D. Mo. 1996), was reversed by *Gorman v. Bartch*, 152 F.3d 907, 912-13 (8th Cir. 1998). The holding in *Torcasio v. Murray*, 57 F.3d 1340 (4th Cir. 1995), *cert. denied*, 516 U.S. 1071 (1996), that the involuntariness of prisoners' participation in programs, services, and activities of corrections departments renders them ineligible to file ADA Title II claims, was thoroughly

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[3] The holding actually did not address the scope of Title II. The court rejected the plaintiff's claim of disability discrimination in his arrest based on "the lack of any discernible injury," not because discriminatory arrests are not cognizable under the ADA. *Rosen*, 121 F.3d at 158. *Rosen* is thus also inapposite to defendants' theory because its holding does not conflict with the holding in the present case.

discredited by this Court in *Yeskey*, 524 U.S. at 211.

Similarly, defendants quote the Seventh Circuit for the proposition that "incarceration. . . is not a 'program' or 'activity' covered by the ADA." *Bryant*, 84 F.3d at 249. This holding was overturned two years later by this Court in *Yeskey*. *Yeskey*, 524 U.S. at 210-11.

In *Gohier v. Enright*, the Tenth Circuit held that "a broad rule categorically excluding arrests from the scope of Title II. . . is not the law," 186 F.3d. at 1221, and went on to grapple with how to apply the ADA to the particularities of the arrest process in the case before it. The court thus distinguished between coverage of the statute, which is extremely broad, and the application of the statute, in which real world dangers and necessities might limit the ways in which plaintiffs can obtain relief.

In the present case, the Ninth Circuit quoted *Gohier* in its conclusion, holding that a broad rule categorically excluding the parole process from the scope of Title II is not the law. App. 14. Thus *Thompson* is entirely consistent with *Gohier* and there is no Circuit split. Moreover, the Ninth Circuit took pains to note that the question of exactly how the ADA will apply to parole requires a detailed consideration of the particulars of the parole process as well as a sensitivity to the public safety issues and penological interests involved.[4] App. 12 n.4. The court thus recognized that although the plain language of the ADA

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[4] The present case was dismissed on a motion to dismiss and thus lacks the factual development found in *Gohier* and *Hainze*, both of which were summary judgment cases.

allows for no sweeping exceptions, as this Court affirmed in *Yeskey*, its application requires a careful assessment of the particularities of the situation before the court.

In *Hainze v. Richards*, the Fifth Circuit also grappled with how exactly the ADA applied during an arrest. In *Hainze*, a suicidal, mentally ill man with a knife refused to obey a police officer's orders to disarm and walked directly towards the officer, holding out his knife. The officer shot him and Hainze later claimed that the failure to reasonably accommodate his mental illness constituted disability discrimination. In finding that the plaintiff did not state a claim under Title II of the ADA, the Fifth Circuit explicitly limited its holding to the facts of the case; it stated that the officer's actions

> were the result of a quick discretionary decision made in self-defense and for the safety of those at the scene. We are not persuaded that requiring [the officer] and other similarly situated officers to use less than reasonable force in defending themselves and others, or to hesitate to consider other possible actions in the court of making such split-second decisions, is the type of 'reasonable accommodation' contemplated by Title II.

Id. at 801-02. In other words, no accommodation would be reasonable under those particularized circumstances. The Fifth Circuit affirmed, however, that apart from the extraordinary circumstances of such an exigent moment, when personal safety and security are no longer directly

endangered, reasonable accommodations must be made:

> [o]nce the area was secure and there was no threat to human safety, the [officers' would have been under a duty to reasonably accommodate Hainze's disability. . . That would have put this case squarely within the holdings of . . . *Yeskey* and the cases that have followed.

Id. at 802.

Thus *Hainze* never challenged the ADA's scope. Instead, it grappled with how the statute applies to particular circumstances. The court relied on a "safety and security" exception to the ADA's reasonable accommodation requirement, an exception explicitly recognized in the ADA itself. *See, e.g.*, Department of Justice, App. A to 28 C.F.R. Part 35 at 35.104 (discussing ADA requirement that "a person who poses a significant risk to others will not be 'qualified,' if reasonable modifications to the public entity's policies, practices, or procedures will not eliminate that risk"). The Fifth Circuit, therefore, is entirely consistent with the Tenth Circuit in *Gohier* and the Ninth Circuit in the present case.

Defendants' attempt to create a conflict among the Circuits over the existence of a "substantive criminal-justice context" exception to the ADA fails: no Circuit court opinion has found such an exception. The Ninth Circuit decision in this case was simply an application of this Court's decision in *Yeskey*, and is consistent with all the post-*Yeskey* holdings of other Circuit courts.

CONCLUSION

The first question presented in defendants' petition, Eleventh Amendment immunity, does not provided the basis for review by this Court since it was neither argued nor decided in the Ninth Circuit. The second question presented is also inadequate, since no Court of Appeal has ever found a "substantive criminal-justice context" exception to the ADA and thus there is no conflict among the Circuits on this point. The opinion below is consistent with the opinions of this Court and with the opinions of the other Circuits that have addressed this issue. Therefore, the Petition for Certiorari should be denied.

Dated: February 19, 2003

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Opposition To The Petition For Writ Of Certiorari To The Supreme Court of California

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CERTIFICATE OF SERVICE BY MAIL

Donald Specter, a member of the Bar of the Supreme Court of the United States, states: that his business address is General Delivery, San Quentin , CA; that on February 20, 2003, he served three copies of OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI in the above-entitled matter on the respondents by placing same in an envelope addressed as follows:

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Said envelope was then sealed and deposited in the United States mail at San Rafael, California, with the postage thereon fully prepaid.

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